United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1062

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To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1062

UNITED STATES OF AMERICA,

Appellee,

—v.—

ELPIDIO MORALES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Elpidio Morales appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 28, 1975, after a three day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 74 Cr. 1075, filed November 14, 1974, charged Morales, Milagros Gerena, and Gricel Segui in Count One with conspiracy to distribute narcotics. Count Two charged Morales and Gerena with distributing and possessing with intent to distribute .3 grams of cocaine on October 2, 1974, and Count Three charged Morales, Gerena and Segui with distributing and possessing with intent to distribute 117.43 grams of cocaine on October 3, 1974.

Trial commenced against Morales * on January 14, 1975 and concluded on January 16, when he was found guilty on all counts. On January 28, 1975 Judge Pollack sentenced Morales to concurrent terms of eight years imprisonment on each count, followed by a special parole term of three years. The sentence was to run concurrently with a five year sentence imposed on Morales on November 13, 1974 by Judge Edward Neaher of the Eastern District of New York on his conviction on Indictment 72 Cr. 932 (E.D.N.Y.).

Morales was remanded and is now serving his sentence.

Statement of Facts

The Government's Case

On August 1, 1974, Special Agent Michael Horn of the Drug Enforcement Administration was introduced to Milagros Gerena at the Relaxation Plus Massage Parlor, Hotel Commodore, New York City. Horn, acting in an undercover capacity, told Gerena he was interested in purchasing cocaine. She replied that she would have no difficulty obtaining cocaine for him, and he agreed to contact her subsequently to arrange a purchase. (Tr. 88-89, 124-125).**

Horn spoke to Gerena on two occasions in September, but they were unable to meet. On October 1, Gerena placed a telephone call to Morales, whom she knew by

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* Prior to trial Milagros Gerena entered a plea of guilty to Count One and was sentenced to three years imprisonment, the imposition of all but six months of which was suspended, to be followed by a special parole term of three years. Gricel Sequi entered a plea of guilty to Count Three, received a suspended sentence and was placed on probation for a period of two years.

** "Tr." refers to the trial transcript; "Br." refers to appellant's brief: "A". refers to appellant's appendix.

the name "Bigue Gonzalez." * She told him that she had located a buyer for cocaine, and he replied that he had just received a shipment of high quality cocaine that might well suit the needs of her buyer. (Tr. 125-127).

On October 2, 1974 Gerena called Horn and told him that she could obtain some cocaine for him. They agreed to meet that afternoon at the Holiday Inn located at 440 W. 57th Street, in Manhattan. Gerena then went to the apartment that Morales was sharing with Gricel Segui at 1120 Wyatt Street, Bronx. When she arrived Morales showed her his supply of cocaine and instructed her to negotiate a sale of an eighth of a kilogram for $4,500. He also gave her a small sample of the cocaine enclosed in a folded dollar bill. Gerena then left the apartment and took a cab to the Holiday Inn at 440 W. 57th Street. (Tr. 127-129).

At the Holiday Inn Gerena first met Horn and was later introduced to Special Agent Frederick Marano, whom Horn identified as his partner. She gave Horn the sample wrapped in the dollar bill, and after he pronounced it satisfactory, they commenced negotiating the sale. Although they were able to agree on the price—$4,500—and the amount—an eighth of a kilogram—they disagreed as to the method of payment. Gerena wanted to be paid in advance, but Horn refused to pay until he received the merchandise. Gerena said that she would ask her source to permit the sale to proceed without advance payment and promised to call Horn later that day with an answer. (Tr. 91-93, 112-113, 129-132).

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* At a pre-trial hearing conducted pursuant to *Simmons* v. *United States*, 390 U.S. 377 (1968), Gerena testified that she had known Morales for three years, and that Bigue Gonzalez was the only name by which she knew him (Tr. 46-48).

Gerena called Horn and Marano on the evening of October 2 and told them that her source would be willing to forego advance payment if the sale took place at the apartment of Alvin Sigalow, Gerena's manager at Relaxation Plus. This arrangement was satisfactory to the agents. (Tr. 93-94, 113, 132-133).

On October 3, at approximately 8:30 P.M. Gerena again arrived at 1120 Wyatt Street, where she found both Morales and Gricel Segui.* Morales gave Gerena a package containing an eighth of a kilogram of cocaine. He also told Segui to accompany Gerena, to count the money when it was handed over, and to be sure that she received $5,000. (Tr. 133-135, 163-166).

At approximately 10:25 that evening Gerena and Segui arrived at Alvin Sigalow's apartment, which was located at 333 E. 55th Street in Manhattan. Upon entering the apartment, they met Horn and Marano, who had arrived earlier. Gerena then asked to see the money, and Marano thereupon took out $4,500, which he counted aloud. Gerena and Segui then engaged in a brief argument in Spanish, apparently caused by Segui's understanding that they were to receive $5,000. Segui then insisted on counting the money herself before Horn received the package of cocaine. As she was counting it, the two women were placed under arrest. (Tr. 95-96, 114-115, 135-136, 166-167).

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* Miss Segui, like Miss Gerena, pleaded guilty prior to trial and testified as a Government witness. Also like Miss Gerena, she testified that she only knew the defendant by the name Bigue Gonzalez, although she had lived with him for eight months. (Tr. 167-168). Any doubts about Miss Segui's familiarity with Morales were dispelled when, under insistent cross-examination, she described several distinctive marks on his body, including one on his penis. After conducting an inspection of defendant's person (Tr. 182-183), defense counsel made no attempt to impeach the accuracy of her description.

The Defense Case

The defendant offered no evidence.

ARGUMENT

POINT I

The trial court did not err in ruling that Morales could be cross-examined regarding his prior conviction.

At the close of the Government's case Morales' counsel moved for an order from Judge Pollack precluding reference to defendant's Eastern District conviction * on cross-examination should Morales testify. (Tr. 183-190) Judge Pollack denied the motion, and Morales did not take the witness stand. Relying in large measure on *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965), and *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), Morales claims that Judge Pollack's ruling was reversible error. This contention is insubstantial.

In *Palumbo*, this Court held that a trial judge could exercise his discretion to preclude the use of a prior conviction "if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly." 401 F.2d at 273. *Luck* similarly suggested that the trial court exercise its informed discretion rather

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* Morales entered a plea of guilty to Count 4 of Indictment 72 Cr. 932 (E.D.N.Y.), which charged that on July 26, 1972 he conspired to sell cocaine. (A. 71-72). On November 13, 1974, Judge Neaher sentenced him to five years imprisonment followed by a special probation of three years. (A. 73).

than permit the use of all felony convictions for impeachment.

What Morales overlooks, however, is that subsequent cases construing *Luck* and *Palumbo* have invariably held that no trial judge is in a position to make an informed exercise of discretion *before* a defendant has testified. A trial judge asked to rule on the propriety of impeachment through prior convictions before a defendant has testified can only weigh abstractions; he cannot engage in the careful balancing which *Palumbo* requires. In *United States* v. *Cacchillo,* 416 F.2d 231, 234 (2d Cir. 1969), this Court responded to a claim similar to Morales' in the following manner:

> "Appellant calls our attention to the rule adopted in *Luck* v. *United States,* 121 U.S. App. D.C. 151, 348 F.2d 763, 766-69 (1965), under which the trial judge has a large measure of discretion as to whether or not to admit for purposes of impeachment evidence of previous convictions. While that rule has much to commend it, and this court has endorsed a rule permitting limited discretion (*United States* v. *Palumbo,* 401 F.2d 270 (2d Cir. 1968), *cert. denied,* 394 U.S. 947, 89 S. Ct. 1281, 22 L.Ed. 2d 480 (1969)), it can have no application in the present case since here the trial judge was asked to pass upon the abstract question of whether, if defendant testified, evidence of previous convictions would be permitted. The judge did not have before him either the evidence of defendant or the evidence of previous convictions, both of them essential for the exercise of discretion. Even under the Luck rule it would not be error for the judge to refuse to pass upon the issue under these circumstances. See *Hood* v. *United States,* 125 U.S. App. D.C. 16, 365 F.2d 949 (1966). See also *United States* v. *Evanchik,* 413 F.2d 950 (2d Cir. July 16, 1969); *United States* v. *Hart,* 407 F.2d 1087 (2d Cir.), *cert. denied,* 395 U.S. 916, 89 S. Ct. 1766, 23 L.Ed. 2d 231 (1969)."

See also *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Gornick*, 448 F.2d 566, 571 (7th Cir. 1971).

Unlike the court in *Cacchillo*, Judge Pollack was aware of the nature of Morales' prior conviction. He was not, however, apprised of the nature of Morales' testimony, and could therefore not calculate what effect, if any, evidence of a prior conviction would have. The United States Court of Appeals for the District of Columbia, construing its own decision in *Luck*, has emphasized the necessity of evaluating a defendant's testimony before a ruling can be made on the use of a prior conviction:

> ". . . in many cases the best way for the District Judge to evaluate the situation is to have the accused take the stand in a non-jury hearing and elicit his testimony and allow cross-examination before resolving the *Luck* issue." *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) (Burger, *J.*).

Here Judge Pollack had no opportunity to evaluate Morales' testimony, either in or out of the presence of the jury. Nor did Morales' counsel even make an offer of proof concerning what the substance of his testimony might be. The inadequacy of defendant's showing prevented the trial court from engaging in the balancing required by *Luck* and *Palumbo*. Under the circumstances, Morales can scarcely complain if the balance was not resolved in his favor. See *United States* v. *Kahn*, *supra*, 472 F.2d at 282.

Moreover, the cases following *Luck* and *Palumbo* have repeatedly emphasized that the decision to permit or exclude evidence of a prior conviction, whenever it is made, is peculiarly within the trial court's discretion. As Judge McGowan stated in *Luck*:

> "The matter is, we reiterate, one for the exercise of discretion; and, as is generally in accord with sound judicial administration, that discretion is to

> be accorded a respect appropriately reflective of the inescapable remoteness of appellate review." 348 F.2d at 769.

In *United States* v. *Kahn, supra,* 472 F.2d at 282, this Court noted that "such 'highly discretionary adjudications' will not be reversed 'unless the wisdom of so doing is very clear.'" See also *United States* v. *Nagelberg,* 434 F.2d 585, 588 (2d Cir. 1970), *cert. denied,* 401 U.S. 939 (1971); *United States* v. *DiLorenzo,* 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied,* 402 U.S. 950 (1971).

That Judge Pollack did not abuse his discretion here is most clearly shown in *United States* v. *Christophe,* 470 F.2d 865 (2d Cir.), *cert. denied,* 411 U.S. 964 (1972). In *Christophe,* also a narcotics case, the trial court had ruled that a defendant could be impeached by a 12 year old narcotics conviction, and the defendant then refrained from testifying. This Court found that ruling to be well within the trial court's discretion. *United States* v. *Puco,* 453 F.2d 539 (2d Cir. 1971), makes clear that the older the conviction, the more questionable its usage for impeachment. Morales' conviction was but two years old; under *Christophe* its usage is permissible *a fortiori.*

Morales also claims that Judge Pollack in his ruling ignored the commands of the Federal Rules of Evidence. Quite the contrary, it is apparent that he carefully adhered to their requirements, even though he was in no way bound by them. Rule 609(a), quoted in full at pp. 13-14 of Morales' brief, similarly authorizes use of Morales' prior conviction for impeachment and follows *Luck* and *Palumbo* in requiring the trial court to balance the probative value of admitting a conviction against its prejudicial effect on the defendant. To the extent possible, Judge Pollack engaged in such a balancing. He noted that "in view of the circumstances revealed by this record and the line of defense that has been asserted here, the credibility of this

defendant, if he takes the stand, is very much a question for the jury." (Tr. 188-89).* In a case where the entirety of the defense hinges on a defendant's credibility, it is hardly an abuse of discretion to permit the jury's evaluation of that credibility to be tempered by an awareness of his prior convictions.

It should be noted that the situation facing Judge Pollock was precisely that confronting the trial judge in *Palumbo*. There the court permitted the defendant to be impeached by evidence of 4 convictions that were approximately 10, 20, 30, and 40 years old respectively. This Court found no abuse of discretion in admitting such convictions against the defendant "in light of the *direct conflict of testimony* between the agents and Palumbo *which would have resulted.*" 401 F.2d at 274. (Italics supplied). A similar view can be found in *Gordon* v. *United States*, *supra*, 383 F.2d at 941:

> "Rather [the defendant's criminal record] was received because the case had narrowed to the credibility of two persons—the accused and his accuser—and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed."

Throughout the trial defense counsel insisted (Tr. 198, 253) that the sole issue for resolution was the credibility of Gerena and Segui. *Gordon* and *Palumbo* make clear that where credibility is the central issue, a trial court does not err in permitting a jury to evaluate a defendant's credibility in light of his criminal record.

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* The likelihood of a direct conflict between the testimony of Morales on the one hand and Gerena and Segui on the other was foreshadowed by Morales' post arrest statements to the D.E.A. agents. When questioned about his association with Gerena and Segui, he denied knowing either (Tr. 118). Both Gerena and Segui, of course, testified that they knew the defendant well.

POINT II

The trial court's comments to the jury were not improper.

After the jury had deliberated for over four hours, a note was submitted to Judge Pollack announcing a "hopeless deadlock." Before dismissing the jury for the day the court made several comments on their deliberations (Tr. 251-252) which Morales now claims deprived him of a fair trial.

More specifically, Morales argues that Judge Pollack by his comments "improperly belittled the jury's prior efforts to reach agreement" and "denigrated" the defense's attack on the credibility of the Government's witnesses.* Morales does not argue that the court attempted to coerce a verdict; nor does he claim that the court displayed any partiality toward the Government's case; nor does he suggest that the court expressed, implicitly or explicitly, any belief in the defendant's guilt. He can make none of these arguments, for a fair reading of Judge Pollack's remarks discloses not the slightest hint of bias. Judge Pollack merely stated that the case was not a difficult one; in view of the evidence adduced, this was scarcely a misrepresentation.

Measured against the standards governing supplemental charges that have evolved in this Circuit, Judge Pollack's remarks were hardly prejudicial. Most of the supplemental charges that have been challenged in this Court derive from *Allen* v. *United States*, 164 U.S. 492 (1896). See, e.g., *United States* v. *Domenech*, 476 F.2d 1229 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973); *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971);

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* The precise location of the supposed denigration contained in the remarks is nowhere specified.

United States v. *Thomas*, 282 F.2d 191 (2d Cir. 1960). Characteristically, such charges ask the jurors in the minority to rethink their position carefully and urge, often in strong terms, the importance of reaching a verdict. See *United States* v. *Hynes*, 424 F.2d 754, 756 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970). However, remarks similar to those of Judge Pollack have frequently been scrutinized and found unexceptionable by this Court. In *United States* v. *Birrell*, 447 F.2d 1168 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972), the trial court stated, "I am frank to say that I see no reason why a verdict cannot be reached," and a guilty verdict was returned two and one half hours later. In *United States* v. *Bowles*, 428 F.2d 592 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970), the trial court stated "It seems to me that in case of this kind where the evidence has been so short and the arguments have been made to you immediately thereafter that you should come to some conclusion."

Furthermore, typical *Allen* charges often have substantial impact not merely in theory but in practice: the jury in *United States* v. *Hynes*, *supra*, returned a verdict of guilty five minutes after the supplemental charge was given, and the jury in *United States* v. *Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969) returned a verdict in thirty minutes. Here, in contrast, Judge Pollack's remarks were delivered as he was excusing the jury for the day. The remarks, furthermore, contained the admonition that the jurors were not to give the case any thought until they reconvened on the following day. Any impact the court's remarks might have had was of necessity blunted by the sixteen hour hiatus in the jury's deliberations. Moreover, if the jury's subsequent response is any index of coercion, the court's remarks were indeed innocuous. The jury returned at 9:30 A.M. on the following day and did not reach a verdict until 2:45 P.M. that afternoon. This Court's observation in *United States*

v. *Barash*, 412 F.2d 26, 32 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969) applies here *a fortiori*:

> "Furthermore, in view of the fact that more than three hours elapsed between the time of the charge and the jury's final verdict, the jury had ample time for thoughtful consideration which would negate coercion."

Finally, of the three cases cited by Morales in support of his argument, two, *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) and *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969), express the view of Circuits that have forbidden use of the *Allen* charge. This Court has expressly declined to follow that view and those cases. See *United States* v. *Martinez*, 446 F.2d 118, 119 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971); *United States* v. *Hynes, supra*, 424 F.2d at 757.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEREMY G. EPSTEIN,
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Assistant United States Attorneys, Of Counsel.

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of May, 1975 he served ~~a copy~~ of the within 5 ltr copies by placing the same in a properly postpaid franked envelope addressed:

Henry Boitel, Esq.
233 Broadway
New York, N. Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing inside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jerry G. Epstein

Sworn to before me this
9th day of MAY, 1975
Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977